

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON DEPUTY

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. DAVID SMITH,

Defendant.

NO. CR03-0370RSL

PLEA AGREEMENT

The United States of America, by and through John McKay, United States Attorney for the Western District of Washington, Kurt P. Hermanns and Floyd G. Short, Assistant United States Attorneys for said District, and the defendant, J. DAVID SMITH, and his attorneys, Jon Zulauf and Laurence B. Finegold, enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11(c):

1. The Charge. Defendant, having been advised of the right to have this matter tried before a jury, agrees to waive that right and enter a plea of guilty to the following charge contained in the Superseding Indictment. By entering this plea of guilty, Defendant hereby waives all objections to the form of the charging document.

a. Conspiracy, as charged in Count 1, in violation of Title 18, United States Code, Section 371.

2. Elements of the Offense. The elements of the offense of conspiracy, as charged in Count 1, in violation of Title 18, United States Code, Section 371, are as follows:

1 First, that the defendant did knowingly conspire, combine, confederate, and
2 agree together with others to commit offenses against the United States;

3 Second, that the defendant knew the unlawful purpose of the agreement and
4 joined in it willfully, that is, with the intent to further the unlawful purpose; and

5 Third, that one of the conspirators during the existence of the conspiracy
6 knowingly committed at least one of the overt acts described in the Superseding
7 Indictment, in order to accomplish some object or purpose of the conspiracy.

8 3. The Penalties. Defendant understands that the statutory penalties for the
9 offense of Conspiracy, as charged in Count 1, are as follows:

10 a. Count 1 (Conspiracy): imprisonment for up to five (5) years, a fine
11 of up to two hundred fifty thousand dollars (\$250,000.00), a period of supervision
12 following release from prison of at least two (2) but not more than three (3) years, and a
13 one hundred dollar (\$100.00) penalty assessment. The defendant agrees that the penalty
14 assessment shall be paid at or before the time of sentencing.

15 Defendant agrees that any monetary penalty the Court imposes, including
16 the special assessment, fine, costs or restitution, is due and payable immediately, and
17 further agrees to submit a completed Financial Statement of Debtor form as requested by
18 the United States Attorney's Office.

19 Defendant understands that supervised release is a period of time following
20 imprisonment during which he will be subject to certain restrictions and requirements.
21 Defendant further understands that if supervised release is imposed and he violates one or
22 more of its conditions, he could be returned to prison for all or part of the term of
23 supervised release that was originally imposed. This could result in Defendant serving a
24 total term of imprisonment greater than the statutory maximum stated above.

25 4. Rights Waived by Pleading Guilty. Defendant represents to the Court that
26 he is satisfied with the representation provided by his attorney. Defendant understands
27 that, by pleading guilty, he knowingly and voluntarily waives the following rights:

28 a. The right to plead not guilty, and to persist in a plea of not guilty;

1 b. The right to a speedy and public trial before a jury of Defendant's
2 peers;

3 c. The right to the effective assistance of counsel at trial, including, if
4 Defendant could not afford an attorney, the right to have the Court appoint one for
5 Defendant;

6 d. The right to be presumed innocent until guilt has been established at
7 trial, beyond a reasonable doubt;

8 e. The right to confront and cross-examine witnesses against
9 Defendant;

10 f. The right to compel or subpoena witnesses to appear on Defendant's
11 behalf;

12 g. The right to testify or to remain silent at trial, at which trial such
13 silence could not be used against Defendant; and

14 h. The right to appeal a finding of guilt or any pretrial rulings.

15 5. Applicability of Sentencing Guidelines. Defendant understands and
16 acknowledges the following:

17 a. The United States Sentencing Guidelines, promulgated by the
18 United States Sentencing Commission, are applicable to this case;

19 b. The Court will determine Defendant's applicable Sentencing
20 Guidelines range at the time of sentencing;

21 c. The Court may impose any sentence authorized by law, including a
22 sentence that, under some circumstances, departs from any applicable Sentencing
23 Guidelines range up to the maximum term authorized by law;

24 d. The Court is not bound by any recommendation regarding the
25 sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines
26 range offered by the parties, or by the United States Probation Department; and

27 e. Defendant may not withdraw a guilty plea solely because of the
28 sentence imposed by the Court.

1 6. Ultimate Sentence. Defendant acknowledges that no one has promised or
2 guaranteed what sentence the Court will impose.

3 7. Restitution. Defendant shall make restitution in an amount set by the court.
4 Said amount shall be due and payable immediately and shall be paid in accordance with a
5 schedule of payments as set by the United States Probation Office and ordered by the
6 Court.

7 8. Statement of Facts. The parties agree on the following facts in support of
8 Defendant's guilty plea and for purposes of calculating the base offense level of the
9 Sentencing Guidelines. Defendant admits he is guilty of the charged offense.

10 a. At all relevant times J. DAVID SMITH was an attorney licensed to
11 practice law in the State of Washington. Mr. SMITH acted in that capacity for an
12 individual named Terry Martin in connection with a series of development projects
13 planned and pursued by Mr. Martin. Mr. SMITH also performed tasks other than
14 providing legal advice.

15 b. Beginning in approximately late 1998, Mr. SMITH assisted Mr.
16 Martin in the planning of a project called the Silver Sound Corporate Center, an office
17 park comprised of six buildings and a total of more than 500,000 square feet of
18 commercial office space to be located near Paine Field within the boundaries of the City
19 of Everett, Washington. Mr. SMITH also assisted Mr. Martin in obtaining participation
20 in the project by the Holmes Harbor Sewer District (HHSD) located on Whidbey Island,
21 Washington. The plan involved HHSD issuing approximately \$20 million in tax-exempt
22 municipal bonds to acquire a portion of the development property and to construct public
23 infrastructure such as sewage, drainage, water service and roads. The project included
24 Mr. Martin's purported acquisition of an additional \$43 million in private financing to
25 construct six office buildings on the remaining portion of the property. Repayment of the
26 bonds was to be made from assessments levied upon Mr. Martin's portion of the property,
27 and the source of revenue to pay those assessments was to be rents from the office
28 buildings.

1 c. The total area of the development land was approximately 40 acres.
2 Pursuant to Mr. Martin's development plan, HHSD would own 15 acres of the property
3 on which the public infrastructure was to be constructed, including such things as roads,
4 drainage structures, and wetlands. HHSD would pay for those 15 acres with about \$6.2
5 million in bond proceeds. Mr. Martin would own the other 25 acres on which the six
6 office buildings would be constructed. Mr. SMITH knew and understood the importance
7 of establishing the value of the 15 acres to be purchased by HHSD. Mr. SMITH also
8 knew that HHSD believed it would be purchasing its 15 acres from Mr. Martin. In truth
9 and in fact, however, Mr. SMITH knew that HHSD had been misled by Mr. Martin. Mr.
10 Martin would not independently purchase the 40 acres, but instead would use HHSD's
11 \$6.2 million in bond proceeds to pay the seller for the full 40 acres. Thus, Mr. Martin
12 was going to keep 25 acres for himself while paying virtually none of his own funds. Mr.
13 SMITH recalls discussing and planning with Mr. Martin that the purchase and sale
14 transaction would be "bumped up" between related companies to make it appear that one
15 of Mr. Martin's companies had purchased it for \$6.2 million and then sold it to another of
16 Mr. Martin's companies at a higher price, but no such transaction occurred. Instead, at
17 closing of the bond issuance the \$6.2 million disbursement of bond funds was paid into
18 escrow and then to the seller, while HHSD received title to its 15 acres and Mr. Martin's
19 company received title to his 25 acres. In other words, Mr. SMITH knew and understood
20 that Mr. Martin had contrived to obtain his 25 acres essentially for free. Mr. SMITH
21 knew and understood that this was an omission of material information from HHSD, the
22 broker/dealers and the bond purchasers. Mr. SMITH also knew and understood that
23 several letters provided to the HHSD purporting to support a value of about \$6.2 million
24 for HHSD's 15 acres were false and misleading.

25 d. Mr. SMITH knew and understood that construction of the Silver
26 Sound Corporate Center was critical to the HHSD bond issuance and understood further
27 that various permits and entitlements were required for construction to occur. Beginning
28 in at least April of 2000, Mr. SMITH was aware that Mr. Martin was making

1 misrepresentations and false statements to HHSD and others concerning the status of the
2 permits. In April of 2000, Mr. SMITH knew that Mr. Martin, in conjunction with the
3 HHSD's Engineer, Les Killingsworth, authored a letter falsely stating that the necessary
4 permits to begin construction were in place. Mr. SMITH was present at various HHSD
5 Board of Commissioners meetings where Mr. Martin misled the Commissioners to
6 believe that the permits were in place. Mr. SMITH also knew at the time the bond
7 issuance closed, on or about October 26, 2000, that representations contained in the bond
8 documents were false and fraudulent concerning the status of the permits and
9 entitlements.

10 e. Various documents related to the bond issuance, including the
11 Preliminary Official Statement (POS) and Official Statement (OS), represented that all
12 500,000 square feet of office space at the Silver Sound Corporate Center had been
13 pre-leased. Initially, Mr. Martin told Mr. SMITH the tenant was Microsoft and displayed
14 what purported to be a binding lease with the tenant's name blacked out. Mr. Martin
15 claimed that Microsoft required its identity as the tenant to be kept confidential. By
16 approximately June of 2000, however, Mr. SMITH knew and understood that the so-
17 called Microsoft lease was fraudulent. Mr. SMITH nevertheless assisted Mr. Martin in
18 the preparation and distribution of various documents purporting to terminate the
19 fictitious lease. Mr. SMITH knew that, too, was false.

20 f. In the fall of 2000, Mr. SMITH learned that Mr. Martin had
21 negotiated a lease with a company called R.A. King. As Mr. SMITH also knew, R.A.
22 King was reluctant to bind itself to a lease, and Mr. Martin proposed that he execute a
23 side-agreement that would enable R.A. King to repudiate the lease for any reason or no
24 reason at all. Mr. SMITH prepared the side-agreement at Mr. Martin's direction and
25 delivered it to R.A. King. Mr. Martin directed Mr. SMITH to keep the side-agreement
26 secret, which he did. Mr. SMITH knew and understood that the secret side-agreement
27 rendered the R.A. King lease illusory.

28 g. At some point in time, Mr. SMITH also became aware that Edward

1 Tezak had executed a document on behalf of a company named J. Zacket Enterprises,
2 Inc., representing that the company was a subsidiary of R.A. King and indicating an
3 intention to lease the Silver Sound Corporate Center. Beginning in approximately
4 September 2000, when Mr. Tezak began working in Mr. Martin's office (where Mr.
5 SMITH also worked), and continuing until February 2001, when Mr. SMITH moved out,
6 Mr. SMITH observed Mr. Tezak providing increasing assistance to Mr. Martin in the
7 HHSD municipal bond matter. From his dealings with R.A. King and Mr. Martin, Mr.
8 SMITH knew and understood that there was no relationship between R.A. King and Mr.
9 Tezak or his company, J. Zacket Enterprises, Inc. At a later date Mr. Smith discovered
10 the letter of intent from Mr. Tezak, and Mr. Smith understood the letter was false and
11 fraudulent. Mr. SMITH, Mr. Martin and Mr. Tezak all understood that HHSD, the
12 broker-dealers, and the bond investors relied upon the existence of a binding lease as a
13 material element of the bond issuance. Mr. SMITH fully understood that representations
14 in various bond documents describing the leases were false and fraudulent. Mr. SMITH
15 also knew that the existence of a valid and binding lease was the primary basis of the
16 appraised value of the property and an essential component of the bond offering.

17 h. The bond documents stated that Mr. Martin had a construction loan
18 commitment from an entity called Goldman Sig, Inc., in the amount of \$43 million, as
19 well as an additional commitment from the same entity for approximately \$20 million
20 acting as a guarantee for repayment of the bonds. By at least the time of the bond closing
21 on October 26, 2000, Mr. SMITH knew and understood that those representations were
22 false. Mr. SMITH had assisted in the preparation of the construction loan agreement for
23 the purported financing and drafted the incorporation documents for Goldman Sig, Inc.
24 In a conversation between Mr. Martin and Mr. SMITH, Mr. Martin stated that the related
25 equity participation agreement, drafted by Mr. Martin and Mr. Tezak, was a sham and
26 was only for the purpose of being included in the bond documents and satisfying the
27 bond underwriters. Based on that conversation and everything else he knew by that time,
28 Mr. SMITH believed and understood that the other financing documents were also

1 fraudulent. Mr. SMITH also knew and understood that the name "Goldman" had been
2 selected to create the false impression that Goldman Sachs was the lender. In the
3 Goldman Sig incorporation documents, which Mr. SMITH drafted under the direction of
4 Mr. Martin, Mr. White and Mr. Tezak, Goldman Sachs was falsely identified as a funding
5 source. In meetings with the HHSD Board of Commissioners, Mr. SMITH relayed to
6 them that Goldman Sachs was the lender. By the time of closing, Mr. SMITH knew that
7 was false. From conversations and from other dealings with Mr. Martin and Mr. Tezak,
8 when the bonds were issued on or about October 26, 2000, Mr. SMITH knew and
9 understood that there were no loan funds as represented. Mr. SMITH became aware that
10 Mr. Tezak and Mr. Martin prepared draw schedules by which Mr. Martin expected to
11 receive additional bond funds to construct the infrastructure for HHSD's 15 acres. By
12 mid-October, 2000, Mr. SMITH knew and understood that Mr. Martin and Mr. Tezak had
13 prepared these schedules well knowing that there was no private funding in place for
14 construction of the office buildings.

15 i. Mr. Tezak told Mr. SMITH that he had arranged the approximately
16 \$63 million in private financing for construction of the private component of the Silver
17 Sound Corporate Center and for the guarantee for the bonds. Mr. Tezak identified to Mr.
18 SMITH the individual who was to provide the funds. Mr. Tezak claimed that this
19 individual (who has the initials DB) had large amounts of money that he was willing to
20 lend for the Silver Sound project. Mr. SMITH learned, either by the time of closing or
21 shortly thereafter, that Mr. Tezak's claims were false. Mr. SMITH later learned from Mr.
22 Martin that DB had never agreed to loan the funds.

23 j. At the time of bond closing, Mr. Martin's company Silver Legacy
24 was paid about \$1.2 million out of the bond proceeds, purportedly as reimbursement for
25 costs his company had previously incurred on the Silver Sound project. Mr. SMITH
26 knew and understood that bond proceeds could be used only to reimburse for work
27 already performed and could not be disbursed for future work or any type of credit.
28 Mr. SMITH was aware of Mr. Martin's reimbursement request and knew that significant

1 portions of the request were for work that had not in fact been performed. Mr. SMITH
2 also knew that a large portion of the request was related to costs which had purportedly
3 been incurred by the prior owner and was purportedly transferred to Mr. Martin.
4 Mr. SMITH knew and understood that any reimbursement for private costs was contrary
5 to restrictions contained in the bond documents. He also knew that the purported transfer
6 was pursuant to a document that Mr. Martin and Mr. Tezak generated and back-dated.
7 Mr. SMITH knew and understood that Mr. Martin's reimbursement request was false and
8 fraudulent.

9 k. At the time of bond closing on or about October 26, 2000,
10 Mr. SMITH signed a certification as counsel for the developer, Mr. Martin, affirming that
11 information from the developer and information in the bond documents was true and
12 accurate. That certification was false. Mr. SMITH knew and understood that many
13 representations made by Mr. Martin and many representations contained in the bond
14 documents were false and fraudulent.

15 l. Mr. SMITH was aware that on or about December 7, 2000, Mr.
16 Martin and the HHSD Engineer, Les Killingsworth, submitted another pay request in the
17 approximate amount of \$902,000. Mr. Martin directed Mr. SMITH not to reveal this pay
18 request to the bond counsel. Mr. SMITH knew and understood that this pay request and
19 the accompanying invoices were false and fraudulent in that they claimed payment for
20 work that had not occurred. Mr. SMITH attempted without success to persuade Mr.
21 Martin not to submit the request. Mr. SMITH alerted the HHSD Board of Commissioners
22 that another pay request was coming and that essentially no work had been done. The
23 HHSD Board thereafter disapproved the pay request.

24 m. From about February 1999 until about June 2001, Mr. SMITH was
25 paid a monthly retainer by Mr. Martin of approximately \$6,800. Mr. SMITH also
26 received \$100,000, beyond his retainer, from bond proceeds at the time the bond issuance
27 closed on about October 26, 2000. Additionally, Mr. SMITH and Mr. Martin had agreed
28 that Mr. SMITH would receive further amounts ranging from \$100,000 to \$500,000 for

1 assistance on this and other projects.

2 n. Mr. SMITH was aware from discussions with Mr. Martin and
3 Mr. Tezak that Mr. Tezak was to be paid for his role in purportedly arranging private
4 financing for the Silver Sound Corporate Center project. Mr. SMITH also learned, at a
5 later time, that Mr. Martin in fact paid Mr. Tezak \$50,000 for these services shortly after
6 bond closing on October 26, 2000.

7 o. Mr. SMITH's actions as described above were taken knowingly,
8 deliberately and with the intent to defraud. He knowingly conspired and agreed with
9 others to commit the offenses of securities fraud and wire fraud.

10 p. The above acts occurred within the Western District of Washington.

11 9. Non-Prosecution of Additional Offenses. As part of this Plea Agreement,
12 the United States Attorney's Office for the Western District of Washington agrees not to
13 prosecute defendant for any additional offenses known to it as of the time of this
14 Agreement that are based upon evidence in its possession at this time, and that relate to
15 the conduct described in the Plea Agreement. In this regard, defendant recognizes that
16 the United States has agreed not to prosecute all of the criminal charges that the evidence
17 establishes were committed by defendant solely because of the promises made by
18 defendant in this Agreement. Defendant acknowledges and agrees, however, that for
19 purposes of preparing the Presentence Report, the United States Attorney's Office will
20 provide the United States Probation Office with evidence of all relevant conduct
21 committed by defendant. At the time of sentencing in this matter, the government agrees
22 to dismiss counts 2 through 20 of the Superseding Indictment as to this defendant.

23 10. Voluntariness of Plea. Defendant acknowledges that he has entered into
24 this Plea Agreement freely and voluntarily, and that no threats or promises, other than the
25 promises contained in this Plea Agreement, were made to induce defendant to enter this
26 plea of guilty.

27 11. Statute of Limitations. In the event that this Agreement is not accepted by
28 the Court for any reason, or defendant has breached any of the terms of this Plea

1 Agreement, the statute of limitations shall be deemed to have been tolled from the date of
2 the Plea Agreement to: (1) 30 days following the date of non-acceptance of the Plea
3 Agreement by the Court; or (2) 30 days following the date on which a breach of the Plea
4 Agreement by defendant is discovered by the United States Attorney's Office.

5 12. Post-Plea Conduct. Defendant understands that the terms of this Plea
6 Agreement apply only to conduct that occurred prior to the execution of this Agreement.
7 If, after the date of this Agreement, defendant should engage in conduct that would
8 warrant an increase in defendant's adjusted offense level or justify an upward departure
9 under the Sentencing Guidelines (examples of which include, but are not limited to:
10 obstruction of justice, failure to appear for a court proceeding, criminal conduct while
11 pending sentencing, and false statements to law enforcement agents, the probation officer
12 or Court), the United States is free under this Agreement to seek a sentencing
13 enhancement or upward departure based on that conduct.

14 13. Cooperation. Defendant shall cooperate completely and truthfully with law
15 enforcement authorities in the investigation and prosecution of other individuals involved
16 in criminal activity. Such cooperation shall include, but not be limited to, complete and
17 truthful statements to law enforcement officers, as well as complete and truthful
18 testimony, if called as a witness before a grand jury, or at any state or federal trial, retrial,
19 or other judicial proceedings. Defendant acknowledges that this obligation to cooperate
20 shall continue after Defendant has entered a guilty plea and sentence has been imposed,
21 no matter what sentence Defendant receives; Defendant's failure to do so may constitute a
22 breach of this Plea Agreement.

23 Defendant understands that the United States will tolerate no deception
24 from him. If, in the estimation of the United States Attorney, information or testimony
25 provided from the date of the Plea Agreement, proves to be untruthful or incomplete in
26 any way, regardless of whether the untruthfulness helps or hurts the United States' case,
27 the United States Attorney for the Western District of Washington may consider that
28 Defendant has breached this Plea Agreement.

1 The United States Attorney's Office for the Western District of
2 Washington, in turn, agrees not to prosecute Defendant for any other offenses, other than
3 crimes of violence, that Defendant may have committed in the Western District of
4 Washington prior to the date of this Agreement about which: (1) the United States
5 presently possesses information; or (2) Defendant provides information pursuant to this
6 Agreement to cooperate with the authorities.

7 The parties agree that information provided by Defendant in connection
8 with this Plea Agreement shall not be used to determine Defendant's sentence, except to
9 the extent permitted by USSG § 1B1.8.

10 In exchange for Defendant's cooperation, as described above, and
11 conditioned upon Defendant's fulfillment of all conditions of this Plea Agreement, the
12 United States Attorney agrees to consider filing a motion pursuant to USSG § 5K1.1
13 permitting the Court to sentence Defendant to less than the otherwise applicable
14 Sentencing Guideline range and below the mandatory minimum sentence.

15 Defendant agrees that his sentencing date may be delayed based on the
16 United States' need for his continued cooperation, and agrees not to object to any
17 continuances of his sentencing date sought by the United States.

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